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Case note

Google News banned by Brussels High Court – *Copiepresse SCRL v. Google Inc.* – Prohibitory injunction of the President of the High Court of Brussels, 5 September 2006

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ABSTRACT

Since 2003, the Google search engine has made available in Belgium its online free service "Google News", which consists of offering Internet users a computer-generated press review. This case note considers the order of the President of the High Court of Brussels, in which it was found that, by offering this service, Google infringed the copyrights and *sui generis* database rights of Belgian newspapers.

1. Facts and stakes of the case

Too much information kills information…. By choosing and sorting information for Internet users, Google imposes itself as the major searching tool of the Web. Keeping the same saying in mind, and applying it in actuality, Google has offered, since 2003 in Belgium, a service called Google News. The website (http://news.google.be) is a computer-generated daily press review sorted between different main topics such as business, sport, entertainment, etc. Any press article is announced by its title, a thumbnail of its illustrating picture when applicable, a brief summary or the first lines of the article and an underlying hyperlink redirecting directly (deep linking) to the page where the article is posted, when the latter is still online.

According to the preliminary expert appointed by the Attachment Judge, as soon as the article was no longer freely available on the site of the Belgian paper, one could obtain its content through a "cached" hyperlink which directs the user to the content of the article that Google registered in the cache memory of its servers.

The same expert described the manner of presenting press articles and the interactivity between the visitor and the web site of Google News, and concluded that Google News was an online information platform and not a search engine.

The expert report also advanced that:

- the functioning of Google News caused loss of control by newspapers over their web sites and their content;
- the use of Google News circumvented advertising on the websites of the newspapers who receive important revenues from advertising inserts;
- the use of Google News shortcut many other elements such as links to other sections or information of the newspaper's editor and publisher, on the protection of copyright and on authorised or non-authorised use of data;
- the Google "cached" option equals to stocking the entire article with a view to redistribution and enabled by-passing of registrations (and the related payments) requested by the publisher for access to archived news.

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2. The proceedings and the decision of the Court

The plaintiff, Copiepresse, represents some of Belgium's biggest newspapers. It is licensed by royal decree to defend the copyrights of its members. On 3 August 2006, a writ of summons to appear in Court, issued by Copiepresse, was served upon Google. Copiepresse claimed that by including headlines and links to online stories from the Belgian press without its prior permission, Google News infringed the copyright and *sui generis* database rights of its newspaper members including ''*La Libre Belgique*'', ''*La Dernière Heure*'' and ''*Le Soir*''.

Google Inc. failed to appear at the hearing of 29 August: the order of 5 September 2006 was handed down by the President of the Court solely taking into account Copiepresse's point of view and documents produced, including the above-mentioned unilateral expert report.[1]

The President of the Court withheld the expert's finding that Google news was an information platform: it concluded that the scheduling of information was left to Google's discretion as Google was the holder of the technology and the algorithm which permitted the automation and systematisation of the reproduction of articles available on the Internet.[2]

The President of the Court noticed that the information was extracted from the press web servers without permission, and held that Google could not exercise any exception provided in the laws relating to copyright and neighbouring rights (Act of 1994) [3] and in the law on database rights (Act of 1998).[4] It therefore found Google to be in breach of the newspapers' rights.

The President of the Court also considered that important revenues from advertising, electronic sale of articles and income from archived articles (paying consultation) were at stake and endangered.

The Order obliged Google:

- to withdraw from all its sites (Google News and ''cache'' Google under whatever denomination) all articles, photographs and graphic representations of the Belgian newspapers, represented by Copiepresse as of the notification of the Order, under a daily penalty of 1,000,000 EUR for every day of delay; and
- to publish in a visible and clear manner, without comments, on the home page of ''google.be'' and ''news.google.be'' the entire Order during an uninterrupted period of 20 days as of the day of the notification of the Order under a daily penalty of 500,000 EUR per day of delay.

3. Copyrights limitations applicable to press reviews: a polemical issue

Even though nobody doubts that press articles are normally copyright protected, the general statement of the President of the Court, that Google News cannot rely on any copyrights' exception to defend its activity, appears to be too expeditious. The question whether press reviews can fall under the application of one of the numerous copyrights' exceptions is still debated, and the recent modification of 2005 of the Belgian Act[5] may well invigorate this debate.

Under the Belgian Act of 1994, the quotation exception (art. 21, §1) and the reproduction for informational purpose (art. 22, §1, no. 1) are the exemptions that are the most likely to cover press reviews such as Google's.

Prior to the modification of 2005, the quotation exemption required quotations to be short and only made for critical, polemical, scientific or educational purposes. They also have to be made in line with the honest practices of the profession, have to be proportionately justified and are not to harm the rights of the author. These conditions are narrowly construed. Because quotations had to be short and ''information purposes'' was not amongst the legitimate aims, press reviews were commonly excluded from the scope of the exemption. But in 2005, two modifications to the provision were made: the quotation does not have to be ''short'' anymore and the ''review'' purpose (*revue* in French) was added. The preparatory legislative works are silent on this last insertion but, presumably, Google will underline this amendment in its upcoming defence in the opposition procedure.

The exception for reproduction for informational purposes covers only the reproduction of short fragments of works (with an exception allowing the reproduction of entire visual art works) when made for reports on recent events. The Belgian legislation provided for this copyright limitation to facilitate a quick spread of information on recent events amongst the public. Authors do not agree whether, in order to apply the exception, the work should be accessory to the report or, on the contrary, whether the work might constitute the ''event'' itself. In the Google case, the question was whether press articles were current ''events''. The Brussels' Civil High Court has already underlined the difference between reports on press articles themselves, and reports reproducing articles in order to give the information conveyed by these press articles. The first type of reports may benefit from the exception, the second

[1] Google Inc. opposed to that default decision [available in English at http://www.chillingeffects.org/international/notice.cgi?action=image_7796]. A preliminary order handed down by the Court on 22 September confirms part of the first order [Cess. Civ. Bruxelles, 22 September 2006, available at http://www.droitbelge.be/fiches/COPIEPRESSE%20v%20GOOGLE.pdf]. A new hearing on the merits of the case takes place before the same Court on 24 November 2006.

[2] In this line of reasoning, the ISP liability exemption regime does not apply (as provided for by art. 12–15 of the ''E-commerce'' directive 2000/31/CE of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, *O.J.*, L178, 17 July 2000, p. 0001–0016). These provisions have been implemented in Belgian law by the act of 11 March 2003 on certain legal aspects of information society services, *M.B.* 17 March 2003 (art. 18–21).

[3] Act of 30 June 1994 on copyrights and neighbouring rights, *M.B.* 27 July 1994; *errata*: *M.B.* 5 et 22 November 1994.

[4] Act of 31 August 1998 implementing in Belgian law the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, *M.B.* 14 November 1998.

[5] Act of 22 May 2005 implementing in Belgian law the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, *M.B.* 27 May 2005.

may not.[6] However, this decision ran somehow counter to a previous Appeal Court decision that dealt with the reuse of pictures. Pursuant to this decision, the exception covers the use of works, which are the events as such, as well as works representing recent or ongoing events.[7] Given this divergent case law, the Google case seems far from being clear-cut as regards the application of the information purpose exception.

4. Database *sui generis* rights infringement?

The President of the Court also found that the newspapers' database rights were infringed. Once again, this finding seems expeditious as it appears from the decision that he did not actually verify whether the databases met the legal conditions to benefit from the *sui generis* rights provided for in the Act of 1998. One of the examinations in the ongoing proceedings before the Belgian courts is whether the newspapers' websites actually qualify as databases[8] and whether substantial investments were made.

Should the Court rule that the newspapers' websites are protected by the *sui generis* rights, it further has to assess whether Google News has extracted substantial parts of their databases, or at least, that systematic or repeated extractions of unsubstantial parts of these databases were made. At first sight, this last question is likely to be replied in the affirmative, given how Google News is described and considering its *modus operandi*.

5. Deep linking and caching: Internet techniques endangered?

The Court showed comprehension for the economic and technical pleas of Copiepresse. They echo some of the findings of the expert and are directed against common Internet techniques such as ''deep linking'' and ''caching''. ''Deep linking'' would circumvent the websites' homepages, some advertisements or ''hit counters''. ''Caching'' would make it possible to reach content that, the day after the event, is otherwise locked by the newspapers and subject to access fees. These techniques would therefore be ''harmful'' to websites owners and to their online business models.

Deep linking has raised, in Belgium as elsewhere, thorny questions about the scope of copyrights as well as other legal issues (such as liability and fair commercial practices). As regards copyrights, there have been attempts to apply its exclusive regime to linking. Linking has sometimes been described as a way to communicate further on works to the public, or has even been compared to reproduction. A Dutch court has already ruled that a linking to a page is not equivalent to a reproduction of the page.[9] The same court did not find deep linking to press articles gathered in the newspapers' websites to be unlawful. The Federal Court of Justice in Germany ruled that hyperlinking to press article was not to be considered copyright infringing.[10] One can also add in this respect that a Belgian court found that the making of hyperlinks was not unlawful as such.[11]

Should caching be seen as reproduction and/or communication to the public requiring the authorisation of the copyright owners? In the European Union, a copyrights exception is provided by art. 5, no. 1 of the Directive 2001/29 CE that covers:

> *temporary acts of reproduction […] which are transient or incidental and an essential part of a technological process and whose sole purpose is to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made, and which have no independent economic significance.*[12]

In the present case, one could advance that Google's cache does not solely aim at transmitting information and that it has an independent economic significance. It is noticeable, however, that in the USA the District Court in Nevada has recently ruled that serving a webpage from Google cache does not constitute direct infringement and is, in any case, fair use.[13] It is even the case that the Supreme Court of Canada has found that the caching activities of ISPs do not violate the exclusive rights of authors to communicate their works to the public.[14] These decisions offer authority for the Google defence before the Belgian Court that Google's caching activities are not an unlawful copyright infringement.

One can question in this respect, whether caching activities would not systematically lead to infringement of *sui generis* rights pertaining to the cached websites, which are so protected. Indeed, systematically extracting entire websites or parts of websites to speed up their access could somehow summarise what ''caching'' defines. In other words, caching activities are *per se* likely to touch *sui generis* rights. Exceptions to the *sui generis* rights are much less numerous than the copyright limitations and, unless caching is seen as an act not conflicting with the normal exploitation of an online database and not unreasonably prejudicing the legitimate interests of its maker, no exception to the *sui generis* database rights seems to cover such activity.

More fundamentally, one must bear in mind the harm inflicted upon the Internet if a court were to rule that, in general, deep linking and caching equals infringing copyrights and/or *sui generis* rights on the linked or cached web pages.

[6] Civ. Bruxelles (14e ch.), 8 November 2005, A&M, 2006/1, p. 60–64.

[7] Bruxelles (8e ch.), 3 May 2005, *I.R.D.I.*, 2005, p. 244–257.

[8] Namely ''*collections of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means*''.

[9] Rb. Rotterdam, 22 August 2000, *Mediaforum 2000*, no. 61, [kranten.com – case].

[10] Bundesgerichtshof, 17 July 2003, available at http://juris.bundesgerichtshof.de.

[11] Civ. Antwerpen, 16 december 2005, *unpublished*.

[12] Implemented in Belgian law in art. 21, §3 of the Act of 1994.

[13] *Field v. Google, Inc.*, No. CV-S-04-0412-RCJ-LRL, United States District Court District of Nevada (2006), available at http://fairuse.stanford.edu/primary_materials/cases/fieldgoogle.pdf.

[14] *Société canadienne des auteurs, compositeurs et éditeurs de musique v. Assoc. Canadienne des fournisseurs Internet*, 2004 CSC 45, [2004] 2 R.C.S. 427, available at http://csc.lexum.umontreal.ca.

These two important techniques are essential to quickly find or refer to pertinent information: they are an inherently embedded part of global Internet technology. Hence, users of the Internet supposedly know or should know and agree with its way of functioning. Therefore, legal authors promote the ''implied licence'' theory with respect to hyperlinking. Under this theory, websites owners implicitly authorise other Internet users to link to their websites. In that philosophy and understanding, it should be emphasised that, should these websites owners not agree with caching and deep linking, they have technical features at their disposal to avoid these activities and their alleged ''harmful'' effects. Caching can be prevented through the addition of a simple HTML line in the headers of web pages. Deep linking can be excluded by technical protective measures. These factual and technical points were explicitly accepted and withheld by several of the abovementioned jurisdictions as the basis for their decisions pursuant to which these techniques were held legitimate.

Finally, and as a reminder, an exonerating regime for the benefit of Internet Service Providers was set up by way of the E-commerce Directive 2000/31/EC, art. 12–15 to safeguard the efficient functioning of the Internet. This is not to say, however, that Google News or even Google ''cache'' qualify as ISPs under the Directive, and that their services be covered by the exemption; this is far from being granted.

6. Conclusion

Google has opposed the default order. The Court preliminary hearing confirmed the order to publish the Decision on 22 September 2006, but the remainder of the matter and all of the merits have been scheduled to be brought back before Court on 24 November 2006.

Besides the importance of the media coverage of the Order here commented, the dispute matters because it addresses many sensitive legal issues pertaining to copyrights and database rights and their exceptions, as well as to the use of Internet techniques, such as deep linking and caching.

However, more important judicial decisions than this default order are still to come.

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